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Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 71-1721

CHRYSLER CORPORATION,
Petitioner,

VERSUS

OPAL I. VAUGHN, Guardian of the Person and Estate of Johnnie B. Vaughn and MID-CONTINENT CASUALTY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

ELLIOTT C. FENTON and
WM. G. SMITH, of
FENTON, FENTON, SMITH, RENEAU & MOON
405 Investors Capital Building
Oklahoma City, Oklahoma 73102
Counsel for Petitioner

July, 1971

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
The Jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254	2
Questions Presented:	
1. Whether the opinion of the Court of Appeals in a case governed by Oklahoma Laws, violated the Erie Ry. Co. v. Tompkins Doctrine in admittedly going "much further than just reiterating existing law" of the State of Oklahoma	2
2. Whether the opinion of the Court of Appeals is in conflict with decision of other Circuits on the same issues and is in conflict with its own prior decisions	2
Statutes, Federal Rules	2
Statement of the Case	3
Reason for Granting the Writ	4
Conclusion	8

APPENDIX

Appendix A:	
Judgment of the United States District Court for the Western District of Oklahoma	i-ii
Appendix B:	
Opinion of the United States Court of Appeals for the Tenth Circuit	iii-viii

TABLE OF CONTENTS CONTINUED PAGE

Appendix C:

Letter notifying attorney that orders have been entered denying Petition for Rehearing ix

Appendix D:

Letter notifying attorney that an order has been entered extending stay of mandate until and including August 5, 1971, pending certiorari x

TABLE OF AUTHORITIES

CASES:

Ayers v. Amatucci, 206 Okla. 366, 243 P.2d 716 (1952) 5

Barnhart v. Freeman Equipment Co., 441 P.2d 993 (Okla. 1968) 4

Carter Oil Co. v. Independent Torpedo Co., 107 Okla. 209, 232 Pac. 419 (1924) 5

Cities Service Oil Co. v. Kindt, 200 Okla. 64, 190 P.2d 1007 (1947) 5

Coe v. Esau, 377 P.2d 815 (Okla. 1963) 5

Criqui v. Blaw-Knox Corporation, 318 F.2d 811 (10th Cir. 1963) 6-7

Erie Ry. Co. v. Tompkins, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 ..... 4, 5

Ford Motor Co. v. Mathis, 322 F.2d 267 (5th Cir. 1963) 6

Ford Motor Company v. McDavid, 259 F.2d 261, cert. den. 358 U.S. 908, 79 S.Ct. 234, 3 L.Ed.2d 229 (4th Cir. 1958) 6

Gulf Oil Corporation v. State, 360 P.2d 933 (Okla. 1961) 5

Helene Curtis Industries, Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967), cert. den. 391 U.S. 913, 88 S.Ct. 1806, 20 L.Ed.2d 652 (1968) 6

AUTHORITIES CONTINUED

	PAGE
MacLean v. Parkwood Inc., 354 F.2d 770 (1st Cir. 1966)	6
Marathon Battery Co. v. Kilpatrick, 418 P.2d 900 (Okla. 1965)	4
Michel v. Branham, 327 P.2d 440 (Okla. 1958)	5
Sautbine v. Keller, 423 P.2d 447 (Okla. 1966)	5
Wallace v. Tulsa Yellow Cab Taxi and Baggage Co., 178 Okla. 15, 61 P.2d 645 (1936)	5
STATUTES:	
28 U.S.C. 1254(1)	2

In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. ——

CHRYSLER CORPORATION,
Petitioner,

VERSUS

OPAL I. VAUGHN, Guardian of the Person and Estate of Johnnie B. Vaughn and MID-CONTINENT CASUALTY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

Petitioner, Chrysler Corporation, a corporation, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on April 14, 1971, affirming the trial court's judgment in favor of the respondents and against this petitioner. Petition for Rehearing was timely filed. A motion to Stay the Mandate has been granted to August 5, 1971.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Tenth Circuit, is not yet officially reported and is appended to this petition in Appendix B at pp. iii-viii. It affirmed a

judgment in the District Court for the Western District of Oklahoma. There is no opinion of that Court. The judgment is printed in Appendix A at pp. i-ii.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 14, 1971, and Petition for Rehearing was timely filed and thereafter denied on June 21, 1971. The Court of Appeals entered further order on July 2, 1971, extending Stay of Mandate to and including August 5, 1971, within which to petition for certiorari. Jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254 (1). Jurisdiction of the District Court was invoked by the Respondents based on diversity of citizenship of the parties.

QUESTIONS PRESENTED

1. Whether the opinion of the Court of Appeals in a case governed by Oklahoma Laws, violated the *Erie Ry. Co.* v. *Tompkins* Doctrine in admittedly going "much further than just reiterating existing law" of the State of Oklahoma.

2. Whether the opinion of the Court of Appeals is in conflict with decision of other Circuits on the same issues and is in conflict with its own prior decisions.

STATUTES, FEDERAL RULES

None are directly applicable herein.

STATEMENT OF THE CASE

This diversity suit arose out of a claim for personal injuries resulting from a truck accident in 1967. Chrysler Corporation, as the original manufacturer and assembler of the 1966 Dodge Truck was the only defendant in the action. The plaintiff Vaughn claimed the accident was caused by a loose clamp in the steering assembly of the truck (which had been driven 18,993 miles before the accident). At the trial it was found by the court and stipulated by the parties that the steering assembly and clamp had been completely changed and modified by an independent retail truck dealer (not a party to the action) to create a different truck with a larger load capacity. It was also found that this change and modification was made without the knowledge or direction of Chrysler. The question of *"agency"* or *"respondeat superior"* was not involved.

In order to affirm the judgment in the District Court, the Court of Appeals admitted in its opinion it had to go "much further than . . . existing law."

The opinion of the Court of Appeals created new law contrary to the existing law of Oklahoma (and elsewhere) and created absolute liability without fault on the part of a manufacturer for unknown changes in a product made by subsequent owners without the knowledge, authorization, or direction of the manufacturer. The effect of the opinion is to make a manufacturer liable merely because its label or its name is on a product.

REASON FOR GRANTING THE WRIT

The decision below should be reviewed because of the following substantial important questions:

1. The opinion of the Court of Appeals is in obvious violation of the doctrine established by this Supreme Court in the case of *Erie Ry. Co.* v. *Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817, 822, requiring, in a diversity action, the law to be applied "is the law of the state." The present opinion states ". . . we recognize our decision goes much further than just reiterating existing law . . . ."

In this action, no Federal Constitutional question or Act of Congress is involved. The accident occurred in Oklahoma, the plaintiff was an Oklahoma resident, and the sale of the subject truck was made in Oklahoma by an Oklahoma Company to the Oklahoma employer of the plaintiff. The law of Oklahoma should be applied to this action as it existed and not as the Court of Appeals deems the law might, or should, some day be in Oklahoma.

In *Marathon Battery Co.* v. *Kilpatrick*, 418 P.2d 900 (Okla. 1965), the Supreme Court of Oklahoma basically adopted the so-called Doctrine of Strict Liability in Tort (breach of implied warranty of fitness of a product) where injuries are alleged to have resulted from the use of a product. This principle was followed by other cases including *Barnhart* v. *Freeman Equipment Co.*, 441 P.2d 993 (Okla. 1968). The principles and requirements involved in such actions are set forth in Restatement of Torts, 2nd, Section 402A. These precedents all require proof that the subject product was defective when it left the hands and control of the named defendant or defendants. In the case at bar, the

only defendant was Chrysler. It was stipulated in the trial court, and recognized in the decision of the Court of Appeals, that no defect existed in this subject truck when it left the hands and control of Chrysler.

The Court of Appeals, in admittedly creating new law, overlooked leading Oklahoma cases which were controlling in this case, if the *Erie* Doctrine is to be followed.

1. A manufacturer-distributor is not responsible for the acts of its authorized dealers. *Coe* v. *Esau*, 377 P.2d 815 (Okla. 1963); *Cities Service Oil Co.* v. *Kindt*, 200 Okla. 64, 190 P.2d 1007 (1947).

2. The burden is upon the plaintiff to prove the product which is alleged to have caused an injury was in the same condition as *when it left the defendant's hands. Michel* v. *Branham*, 327 P.2d 440 (Okla. 1958); *Carter Oil Co.* v. *Independent Torpedo Co.*, 107 Okla. 209, 232 Pac. 419 (1924); *Ayers* v. *Amatucci*, 206 Okla. 366, 243 P.2d 716 (1952).

3. A parent corporation is not responsible for the acts of its wholly owned subsidiary (absent fraud, sham and other factors which are not involved here). *Gulf Oil Corporation* v. *State*, 360 P.2d 933 (Okla. 1961); *Sautbine* v. *Keller*, 423 P.2d 447 (Okla. 1966); *Wallace* v. *Tulsa Yellow Cab Taxi and Baggage Co.*, 178 Okla. 15, 61 P.2d 645 (1936).

The law of Oklahoma was clear as to the non-liabiilty of Chrysler under the stipulated facts as to the material change in the product after it left the hands of Chrysler. The District Court of Appeals should have followed the existing Oklahoma law. It should not attempt to create new law for Oklahoma.

2. This decision of the Court of Appeals, if allowed to stand, creates a conflict between decisions of the various Circuit Courts as to whether the Federal Courts should create new law and speculate as to the possible future law of a State or, whether it must follow the existing law of the State.

Following the *Erie Railroad* Doctrine, the Courts of Appeal have uniformly held that the Federal Courts are bound by applicable state law "as we divine it today, not what it might be tomorrow." *Ford Motor Co.* v. *Mathis,* 322 F.2d 267 (5th Cir. 1963); *MacLean* v. *Parkwood Inc.,* 354 F.2d 770 (1st Cir. 1966), and many others.

The Fifth Circuit Court in *Helene Curtis Industries, Inc.* v. *Pruitt,* 385 F.2d 841 (5th Cir. 1967), *cert. den.* 391 U.S. 913, 88 S.Ct. 1806, 20 L.Ed.2d 652 (1968), applying the existing Oklahoma law in a products liability case, held (at p. 853) the "plaintiff must prove that the product has not been substantially altered after leaving the maker's control." The Oklahoma law is the same now as when it was followed by the Court of Appeals, Fifth Circuit, in the *Helene Curtis Industries* case (1967).

In a most similar factual case, this same principle was followed in *Ford Motor Company* v. *McDavid,* 259 F.2d 261, *cert. den.* 358 U.S. 908, 79 S.Ct. 234, 3 L.Ed.2d 229 (4th Cir. 1958).

Before the present opinion, the Tenth Circuit Court had recognized this same principle in the case of *Criqui* v. *Blaw-Knox Corporation,* 318 F.2d 811 (10th Cir. 1963), at page 814:

> ". . .. we do not believe that this court should lay down a new rule of substantive law in Kansas allow-

ing recovery in the type of action involved here, and, thus, open up a 'new field of litigation' in that state. We, of course, recognize that the modern trend does appear to favor the appellant's position and that the Supreme Court of Kansas, in the absence of statutory prohibitions, may some day lay down such a rule. Nevertheless, that decision should come in the first instance from the Kansas Court and not from this Court."

3. At the beginning of the trial the District Court properly advised the jury as to the Oklahoma law, stating in the *voir dire*:

". . . However, the manufacturer is not deemed to be the absolute guarantor of the safety of all its equipment, and *the manufacturer would not be liable . . . if some intervening company caused the defects after it left the manufacturer's hands . . . .*"

The trial court further said:

"THE COURT: The law requires that a plaintiff prove his case by a preponderance of the evidence, that is in this particular case, Mr. Vaughn must prove, before he can recover, that this steering mechanism was defective, that the defects were caused by the defendant Chrysler Corporation or brought about by that company and that his injuries proximately resulted from the defects. Now, he must prove those things before he's entitled to recover. All of you believe that's good law?

"If he fails to prove those things, then you must return a verdict in favor of the defendant, even though you find that he was injured, it still must be shown that the injuries were caused, in other words, by the defendant . . . ."

Yet, *after* the defendant's evidence was in and the court had found (and the plaintiff had stipulated) there had been a material change of the steering assembly by the corporate dealer, which was unknown to defendant Chrysler, the *court changed* his original statement to the jury as to the law of Oklahoma and instructed that Chrysler was responsible despite the unknown changes made, for its own purpose and benefit, by Dodge Trucks Inc., the separate independent dealer.

There was no change (by decision or statute) in the Oklahoma law between the commencement of trial and the instructions to the jury on the third day of trial.

This creation of new law for Oklahoma by both the District Court and the Court of Appeals is strictly contrary to and in disregard of the *Erie* Doctrine.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ELLIOTT C. FENTON and
WM. G. SMITH, of
FENTON, FENTON, SMITH, RENEAU & MOON
405 Investors Capital Building
Oklahoma City, Oklahoma 73102
Counsel for Petitioner

July, 1971

APPENDIX A

FILED
Sep. 15, 1969
VERA L. HOWARD
Clerk, U. S. District Court
By GLADYS M. JONES
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

OPAL I. VAUGHN, GUARDIAN OF THE PERSON AND ESTATE OF JOHNNIE B. VAUGHN, Plaintiff,	)	
MID-CONTINENT CASUALTY COMPANY, Intervening Plaintiff,	)	No. 68-362 Civil
—vs—	)	
CHRYSLER CORPORATION, a corporation, Defendant.	)	

JUDGMENT

On September 8, 1969, captioned case came on for jury trial. All parties appeared in person and by their attorneys of record. A jury was duly empaneled. After all parties had presented evidence, the case was presented to the jury, which returned a verdict stating,

> "We the jury find in favor of the plaintiff Opal I. Vaughn, Guardian of the person and Estate of Johnnie B. Vaughn, and against the defendant Chrysler Corporation, a corporation, and fix the amount of her recovery at $50,000.00.
>
> "We further find in favor of the intervening plaintiff Mid-Continent Casualty Company, and fix the amount of its recovery at $1,942.12 for cost of repairing the truck."

[APPENDIX]

Judgment is hereby entered in favor of plaintiff for $50,000.00 and the costs of this action.

Judgment is hereby entered in favor of intervening plaintiff for $1,942.12 and the costs of this action.

Judgment entered September 15, 1969.

/s/ LUTHER B. EUBANKS
LUTHER B. EUBANKS
UNITED STATES DISTRICT JUDGE

/s/ WM. G. SMITH
WM. G. SMITH
Attorney for Defendant

JUDGMENT ENTERED IN CIVIL DOCKET OF ADELAIDE HOLSTON, DEPUTY, SEP. 15, 1969

APPROVED:

/s/ GUS RINEHART
GUS RINEHART, Attorney for Plaintiff

/s/ MICKEY JAMES
MICKEY JAMES, Attorney for Intervening Plaintiff

ATTEST: A true copy of the original.
Vera L. Howard, Clerk

By Gladys M. Jones
Deputy

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit
Apr. 14, 1971
HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

March 1971 Term

OPAL I. VAUGHN, Guardian of the Person and Estate of Johnnie E. Vaughn, Plaintiff-Appellee,	)	
MID-CONTINENT CASUALTY COMPANY, Intervening Plaintiff-Appellee,	)	No. 663-69
v.	)	
CHRYSLER CORPORATION, a corporation, Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

William G. Smith (Leroy J. Patton of Fenton, Fenton, Smith, Reneau & Moon, on the brief) for Defendant-Appellant.

Mickey James of Green & James for Mid-Continent Casualty Company, and Michael C. Stewart of Rinehart,

[APPENDIX]

Cooper & Stewart for Opal I. Vaughn (Gus Rinehart on the brief) Plaintiffs-Appellees.

Before LEWIS, Chief Judge, HICKEY* and HOLLOWAY, Circuit Judges.

LEWIS,** Chief Judge.

This is a product liability case in which Chrysler Corporation, the sole defendant, appeals from an adverse judgment for damages entered in favor of plaintiff-appellee for personal injuries suffered by her ward and husband in a one-car automobile accident. The evidentiary facts upon which liability was premised in the action are not now in dispute and present a clear-cut question of law dispositive of the appeal.

The subject product was a Dodge truck manufactured by Chrysler Corporation. This corporation sold the truck to Chrysler Motors, a wholly-owned corporate subsidiary. Chrysler Motors then sold the truck to its wholly-owned subsidiary, Dodge Trucks, Inc. Dodge Trucks is a retail truck dealer. This company sold the truck to another dealer, Clark Motor Company of Oklahoma City, and Clark sold the truck to the ultimate consumer leading to its use by the injured Vaughn.

While the truck was in the possession of Dodge Trucks the front axle was converted from a 5,000- to 7,000-pound axle and the steering assembly accommodated to the axle change. In making this change the holding clamp in the steering assembly was not securely clamped and the resultant unresponsive steering wheel caused the accident to occur. And in summation of the dispositive facts we consider the following to be pertinent:

---

* Judge Hickey, since deceased, heard the arguments in this case but did not participate in this decision.

** By reassignment.

1. The consumer bought from an authorized Chrysler dealer a new truck ordered to specification.

2. The dealer did not have the truck in stock and obtained the vehicle from another dealer, Dodge Trucks.

3. The truck was not defective in manufacture.

4. The truck became defective when altered by Dodge Trucks.

5. The defect caused the accident resulting in injury and damage to Vaughn.

6. Dodge Trucks is a wholly-owned subsidiary, once removed, of Chrysler Corporation, the original manufacturer.

7. The separate corporate organizations of Dodge Trucks and its parent Chrysler Motors are in no way sham. Each of these companies is adequately financed and performs a legitimate and independent function within the total corporate structure of Chrysler Corporation resulting in tax and organizational benefits to Chrysler Corporation.

8. The mechanical work done on the subject truck was not specifically known to, authorized by, and/or delegated by custom to Dodge Trucks as an incident of manufacture by Chrysler Corporation.

Against this factual background the trial court instructed the jury, in pertinent part as follows:

> Evidence has been permitted to come before you in this case tending to show that the separate corporation, Dodge Trucks, Inc., made alterations on the Dodge truck in question by changing the factory installed front axle, from 5,000 pound type to 7,000 pound type, and during opening statements by the Court and counsel you were told that the defendant, Chrysler Corporation, as one of its defenses claimed that this alteration and modification of the truck by the separate

legal entity Dodge Trucks, Inc., would exonerate and absolve the defendant Chrysler Corporation of liability herein. I instruct you, however, that as a matter of law and under the facts in this case the modifications made by Dodge Trucks, Inc., would not relieve Chrysler Corporation of liability in this case if you find that the said truck had a defective steering mechanism when it was delivered by the Clark Motor Company to Mr. Welborn. This is so because the truck was purchased by Welborn as a new vehicle and under the law of the State of Oklahoma a manufacture is liable in tort when an article it places on the market proves to have a defect that causes injury to a human being and said manufacturer cannot escape such liability by tracing the defect to one of its wholly owned subsidiaries provided the said defects are caused prior to the time that said article is placed on the market for sale through an authorized dealer as a new vehicle.

Once again we are faced with the necessity of trying to anticipate how a state court, here Oklahoma, would solve a completely novel legal issue when that court has had no opportunity to give the problem any consideration. We are, of course, entitled to lean on the judgment of the trial judge as knowledgeable and persuasive in the determination of the law and affairs of his resident state. Nevin v. Hoffman, 10 Cir., 431 F2 43, 46; Brunswick Corp. v. J. & P. Inc., 10 Cir., 424 F2 100, 104; Denning v. Bolin Oil Co., 10 Cir., 422 F2 55, 58. And since the judgment of the trial judge seems to reflect a desirable trend in the rapidly progressive field of product liability, we affirm.

We start with the premise that the undisputed facts in this case show liability to exist within the over-all corporate structure of the parent corporate manufacturer, Chrysler Corporation. No true stranger to the financial or marketing structure of the manufacturer has here intervened to destroy the quality of manufacture. The imposed

liability on Chrysler Corporation is thus not that of an insurer but strict to the extent that the reliance of a consumer on the integrity of the manufacturer is not defeated by a complicated corporate structure in which the consumer has no interest nor knowledge that his confidence in the product has been legally thwarted through the mysteries of business technicalities and complications completely foreign to him. The hard factual core of this case lies in the transaction itself: the purchase and sale of a new Dodge truck, defective on delivery. We can see no real reason why the liability of the primary manufacturer should be defeated by an integrated corporate financial structure established and totally controlled by the primary manufacturer. The very nature of this transaction, repeated as it is daily many times throughout the nation, should remain as a desirable and perhaps even necessary fortress allowing, absent extraneous factors, recovery if consumer protection is to be meaningful in the law.

Although we recognize that our decision goes much further than just reiterating existing law we are not without some comfort in principles established in the courts of Oklahoma and elsewhere. The doctrine of strict liability in tort in consumer product cases is firmly established in Oklahoma. Barnhart v. Freeman Equipment Co., 441 P2 993. *And see* "Oklahoma's Emergence from Antiquity, Acceptance of the Doctrine of Strict Liability in Tort," 6 Tulsa L.J. 61, wherein the writer in analyzing the cited and earlier Oklahoma cases indicates the involvement of an applicable doctrine in Oklahoma of imposing strict liability in consumer product cases wherever the social pressures indicate need as a matter of public policy. The case at bar would seem to be such a case in practical application.

The fact that the subject truck was not defective in original manufacture is no defense. Vandermark v. Ford Motor Co. (Cal.) 391 P2 168. Although the defect in *Vandermark* was occasioned by the acts of an authorized dealer

and imposes liability upon the manufacturer through delegation of authority still the case emphasizes the need for consumer protection although the product passes through numerous steps in commerce between the manufacturer and consumer. And perhaps the ultimate in consumer protection was established by the Third Circuit in Gizzi v. Giaccio, — F2 —, decided Jan. 20, 1971, where a divided court held open the possibility of liability of a manufacturer for a defective service or product not its own but perhaps marketed under its apparent authority.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
Office of the Clerk
Denver, Colorado 80202

June 21, 1971

Howard K. Phillips
Clerk

Telephone
303-837-3157

Re: No. 663-69, Opal I. Vaughan, etc. vs. Chrysler Corp., et al. etc.

Mr. William G. Smith
Attorney at Law
405 Investors Capital Bldg.
Oklahoma City, Oklahoma 73102

Dear Mr. Smith:

Orders have been entered today in the above-captioned case denying the petition for rehearing and the suggestion for rehearing en banc.

Yours very truly,

/s/ HOWARD K. PHILLIPS, Clerk
By Helen R. Bartha
Helen R. Bartha
Deputy Clerk.

hkp:hb

CC: Mr. Frank Seay, P. O. Box 1426, Seminole, Oklahoma 74868;

Mr. Mickey James, 710 Leonhardt Bldg., Oklahoma City, Oklahoma;

Mr. Michael C. Stewart, 325 Robert S. Kerr Avenue, Oklahoma City, Oklahoma 73102

—x—

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
Office of the Clerk
Denver, Colorado 80202

July 2, 1971

Howard K. Phillips
Clerk

Telephone
303-837-3157

Re: No. 663-69, Vaughn, et al. vs.
Chrysler Corp.

Mr. W. G. Smith
Attorney at Law
405 Investors Capital Bldg.
Oklahoma City, Oklahoma 73102

Dear Mr. Smith:

An order has been entered today, extending the stay of mandate to and including August 5, 1971, pending certiorari.

Yours very truly,

/s/ HOWARD K. PHILLIPS, Clerk
By Helen R. Bartha
Helen R. Bartha
Deputy Clerk.

hkp:hb

CC: Frank Seay, Esq., P.O. Box 1426, Seminole, Oklahoma 74868;

Mickey James, Esq., 710 Leonhardt Bldg., Oklahoma City, Okla.

Michael C. Stewart, Esq., Law Title Bldg., 325 Robert S. Kerr Ave., Oklahoma City, Oklahoma 73102;

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-172

CHRYSLER CORPORATION,
Petitioner,

VERSUS

OPAL I. VAUGHN, Guardian of the Person and Estate of Johnnie B. Vaughn, and MID-CONTINENT CASUALTY COMPANY,
Respondents.

BRIEF IN OPPOSITION AND RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Oklahoma City, Oklahoma 73102
Attorney of Record for Respondent,
Opal I. Vaughn, Guardian of the Person and Estate of Johnnie B. Vaughn

and

MICKEY JAMES, of
GREEN & JAMES
Leonhardt Building
Oklahoma City, Oklahoma 73102
Attorney of Record for Respondent,
Mid-Continent Casualty Company

of Counsel:
FRANK SEAY
Post Office Box 1426
Seminole, Oklahoma 74868

September, 1971

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY. PH. 235-0030

TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Argument	2
Conclusion	13

APPENDIX

Opinion of Supreme Court of Oklahoma in Ford Mtr. Co. v. Schweitzer, a Minor, No. 43096, June 15, 1971 ..... i-viii

TABLE OF AUTHORITIES

CASES:

Ayers v. Amatucci, 206 Okla. 366, 243 P.2d 716 (1952) 12

Carter Oil Co. v. Independent Torpedo Co., 107 Okla. 209, 232 Pac. 419 (1924) 12

Cities Service Oil Co. v. Kindt, 100 Okla. 64, 190 P.2d 1007 (1948) 12

Coe v. Esau, 377 P.2d 815 (1963) 12

Ford Motor Company v. McDavid, 259 F.2d 261 (4th Cir. 1958) 13-14

Ford Motor Co. v. Schweitzer, a Minor, 42 O.B.J. 1577, not officially reported 11

Gizzi v. Texaco, Inc., 437 F.2d 308 (3rd Cir. 1971), rehearing denied March 8, 1971 14

Greenman v. Yuba Power Products, Inc., 27 Cal. Rptr. 697, 377 P.2d 897 (1962) 3

Gulf Oil Corporation v. State, 360 P.2d 933 (1961) 13

Helene Curtis Industries, Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967) 13

AUTHORITIES CONTINUED PAGE

Industrial Research Corp. v. General Motors Corporation, 29 F.2d 623 (N.D. Ohio 1928) 8-9

Marathon Battery Co. v. Kilpatrick, 418 P.2d 900 (1926) 3

Michael v. Branham, 327 P.2d 440 (1958) 12

Sabloff v. Yamaha Motor Co., 273 A.2d 606 (1971) 9-11

St. Louis & S.F.R. Co. v. Sanford, 54 Okla. 185, 153 Pac. 650 (1915) 6

Sautbine v. Keller, 423 P.2d 447 (1967) 13

Sisco-Hamilton Co. v. Lennon, 240 F.2d 68 (7th Cir. 1957) 8

Vandermark v. Ford Motor Co., 391 P.2d 168 (1964), 37 Cal.Rptr. 896 2-3

Wallace v. Tulsa Yellow Cab Taxi & Baggage Co., 178 Okla. 15, 61 P.2d 645 (1936) 6, 13

MISCELLANEOUS:

19 Am.Jur.2d, Corporation, p. 218 6

7 A.L.R.3d p. 1355 6-8

In the
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OCTOBER TERM, 1971

No. 71-172

CHRYSLER CORPORATION,
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VERSUS

OPAL I. VAUGHN, Guardian of the Person and Estate of Johnnie B. Vaughn, and MID-CONTINENT CASUALTY COMPANY,

Respondents.

BRIEF IN OPPOSITION AND RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The employer of the injured party purchased a new Dodge truck manufactured by Chrysler Corporation from an authorized Dodge dealer. An accident occurred due to a defect in the steering mechanism which existed at the time the truck was purchased. One of the defenses of Chrysler Corporation, and the only one relied upon in this Petition for Certiorari to the Circuit Court for the Tenth Circuit, is that subsequent to its manufacture, the steering mechanism was reassembled by Dodge Trucks, Inc., a wholly-owned subsidiary of Chrysler Corporation.

The references on pages three and eight of the Petition for Writ of Certiorari that the modification of the steering assembly was by "an independent truck dealer" are not correct.

The trial judge, who prior to appointment to the federal bench was a distinguished Oklahoma district judge, instructed the jury that "the modifications made by Dodge Trucks, Inc., would not relieve Chrysler Corporation of liability in this case . . . under the laws of the State of Oklahoma a manufacturer is liable in tort when an article it places on the market proves to have a defect that causes injury to a human being and said manufacturer cannot escape such liability by tracing the defect to one of its wholly owned subsidiaries . . . ."

The Circuit Court in its opinion states that "Dodge Trucks is a wholly-owned subsidiary, once removed, of Chrysler Corporation, the original manufacturer." (Appendix, p.v.)

ARGUMENT

The purchaser has the right to assume the manufacturer, who sells his product through an authorized dealer, is responsible for injuries caused by a defective product.

This was the reasoning of the Court in *Vandermark* v. *Ford Motor Co.*, 391 P.2d 168 (1964), 37 Cal.Rptr. 896. The Court says:

> "Ford contends, however, that it may be held liable for negligence in manufacturing the car or strictly liable in tort for placing it on the market without proof that the car was defective when Ford relinquished control over it. Ford points out that in this case the car passed through two other authorized Ford dealers before it was sold to Maywood Bell and that Maywood Bell removed the power steering unit before selling the car to Vandermark.

* * * * * *

"These rules focus responsibility for defects, whether negligently or non-negligently caused, on the manufacturer of the completed product, and they apply regardless of what part of the manufacturing process the manufacturer chooses to delegate to third parties. It appears in the present case that Ford delegates the final steps in that process to its authorized dealers. It does not deliver cars to its dealers that are ready to be driven away by the ultimate purchasers but relies on its dealers to make the final inspections, corrections, and adjustments necessary to make the cars ready for use. Since Ford, as the manufacturer of the completed product, cannot delegate its duty to have its cars delivered *to the ultimate purchaser free from* dangerous defects, it cannot escape liability on the ground that the defect in Vandermark's car may have been caused by something one of its authorized dealers did or failed to do."

In reaching this conclusion the California Court referred to its previous decision in *Greenman* v. *Yuba Power Products, Inc.*, 27 Cal.Rptr. 697, 377 P.2d 897 (1962). The Oklahoma Court based its decision in the *Marathon Battery* case, 418 P.2d 900 (1926), on *Greenman* v. *Yuba, supra*, thereby embracing that decision as reflecting Oklahoma law.

The finished product was sold in the ordinary course of business by an authorized dealer, Clark Motor Co., as a new vehicle manufactured by Chrysler Corporation. Chrysler Corporation is responsible for a safe vehicle being delivered to the purchaser. It cannot avoid this responsibility by delegating responsibility to its wholly-owned subsidiary.

The evidence adduced from the secretaries of Chrysler Corporation, Chrysler Motors Corporation, and Dodge Trucks, Inc., showed that Dodge Trucks, Inc., was merely an agency of Chrysler Corporation through which it performed an essential part of its business.

The Chrysler Corporation had changes made by Dodge Trucks, Inc., from time to time which were referred to as conversions (Transcript, p. 421). All medium and heavy duty trucks were sold to the dealers by Dodge Trucks, Inc., as new trucks (Transcript, p. 420). The front axle was changed on the truck in question to make it proper for heavier work, which required the steering to be changed (Transcript, pp. 427-428).

For its convenience in marketing medium and heavy duty trucks, Chrysler Corporation established Dodge Trucks, Inc., to sell its products to dealers as new vehicles. It established a policy that when it was desirable to modify a truck to meet a purchaser's needs, such modification would be done according to Chrysler Corporation policy by Dodge Trucks, Inc., and the vehicle delivered to the dealer as a new Chrysler product.

Regardless of who did it, the purchaser was entitled to a safe vehicle when he purchased a new Chrysler Corporation product through an authorized dealer.

There is only one corporation which has stock issued to the public, Chrysler Corporation. A primary part of its business is the manufacture and sale of automotive vehicles. For convenience, a corporation was organized called Chrysler Motors Corporation, all of the capital stock being issued to Chrysler Corporation. Vehicles are sold by Chrys-

ler Corporation to Chrysler Motors Corporation for resale. The sale of these vehicles is an integral part of the business of Chrysler Corporation, without which it could not function. It was then found desirable, in 1964, for a corporation to be organized under the name of Dodge Trucks, Incorporated, for the purpose of servicing and selling vehicles both to the public and to authorized dealers. The servicing and selling of these vehicles is an integral part of the business of Chrysler Corporation, without which it could not function. They could have been, and formerly were, divisions of Chrysler Corporation, rather than independent corporations.

"Q. Mr. Bond, during the time you were Secretary of Chrysler Corporation, do you know why they formed these subsidiaries as corporations rather than as divisions of Chrysler Corporation?

A. What subsidiaries are we talking about?

Q. Well, Chrysler Motors Corporation, Dodge Trucks, Inc., Chrysler Realty Corporation, any one of the hundred.

A. Well, I think the answer would vary with the subsidiary we are talking about. I think generally they were formed because there are financial advantages to the parent and to the subsidiary. Perhaps tax advantages. And that it helps to pinpoint areas of responsibility and to charge people with responsibility on a sort of profit center basis" (Tr., p. 267).

Chrysler Corporation formerly operated its sales of trucks directly. Chrysler Motors Corporation and its subsidiary, Dodge Trucks, Inc., were set up for convenience in

carrying out this essential part of Chrysler Corporation's business.

In 19 Am.Jur.2d, *Corporation*, p. 218, the editors say:

> "However, a corporation which exercises actual control over another, operating the latter as a mere instrumentality or tool, is liable for the torts of the corporation thus controlled. In such cases, the separate identities of parent and subsidiary or affiliated corporations may be disregarded."

The parent company was held liable for the tort of a subsidiary in *St. Louis & S.F.R. Co.* v. *Sanford*, 54 Okla. 185, 153 Pac. 650 (1915), where the subsidiary operated part of a railroad system, and in *Wallace* v. *Tulsa Yellow Cab Taxi & Baggage Co.*, 178 Okla. 15, 61 P.2d 645 (1936), where both companies were managed by substantially the same personnel in the same place of business.

In the annotation on liability of the parent company for the torts of a subsidiary, factors deemed relevant are suggested in 7 A.L.R.3d on page 1355, as follows:

> "(1) Presence in both corporations of the same officers or directors.
>
> "It will be observed that all of the officers of the two subsidiaries were officers of Chrysler Corporation, and were freely exchanged, and often held offices in two of the corporations at the same time.
>
> "(2) Common shareholders.
>
> "In this case there is no stock in the subsidiary corporations in the hands of the public but stock in Chrysler Motors Corporation is owned wholly by Chrysler Corporation, and stock in Dodge Trucks, Inc. is owned wholly by Chrysler Motors Corporation.

"(3) Financial support of the subsidiary's operations by the parent.

"All of the funds necessary for the operations of the subsidiaries were furnished by Chrysler Corporation.

"(4) Underwriting the incorporation and purchase of all of the capital stock of the subsidiary by the parent corporation.

"This is true in this case.

"(5) The fact that the subsidiary was organized with a grossly inadequate capital structure.

"Financing is done by Chrysler Corporation either directly or through its wholly owned subsidiary Chrysler Credit Corporation.

"(6) A joint accounting and payroll system.

"All of the checks for payroll were written by Chrysler Corporation.

"(7) The subsidiary lacks substantial business contracts with any save the parent and operates solely with assets conveyed by the parent corporation.

"True in this case.

"(8) In the financial statements of the parent, the subsidiary is referred to as a division of the parent corporation or obligations are assumed to be those of the parent.

"No testimony appears as to this matter.

"(9) The property of the subsidiary is used by the parent corporation as its own.

"No testimony appears as to this matter.

"(10) The individuals who exercise operating control over the subsidiary exercise it in the interest of the parent.

"No testimony appears as to this matter, but it could hardly be otherwise.

"(11) Failure to observe the formal requirements attributable to the operation of a subsidiary.

"No testimony appears as to this matter."

In *Sisco-Hamilton Co.* v. *Lennon*, 240 F.2d 68 (7th Cir. 1957), there were four corporations, one owning all the stock in the other three, which performed activities under the control of the parent. The holding company was held responsible for the torts of the subsidiary. The Court says:

"The appeal presents a striking illustration of subsidiaries actively implementing each other in rendering services to the plaintiff. This parent corporation cannot sit back on its charter and avoid tort responsibility for its delinquent child."

In *Industrial Research Corp.* v. *General Motors Corporation*, 29 F.2d 623 (N.D. Ohio 1928), the Court says:

"The vast extent of the business of the General Motors Corporation and the variety of its enterprises are matters of such general notoriety, and the reasons why, to conduct such a diversified and extended business, it should employ corporate agencies, are so obvious, that little proof, if any, is necessary to hold the latter as mere adjuncts or agents, especially in the absence of any proof to the contrary; for the court might well take judicial notice of the extent of the business of such an extraordinary and notorious corporation, as we may consider that of a great railroad

enterprise having interstate activities, a doctrine which has already been adjudicated.

* * * * * * *

"It is against sound policy, when a corporation has grown so large, and it has entered into activities so various and so generally distributed, that it finds itself compelled to operate through many subsidiaries, doing nothing directly itself in carrying on its business, to permit it to enjoy exclusively the fruits of such subsidiary activity and to escape the concomitant responsibilities flowing therefrom."

In *Sabloff* v. *Yamaha Motor Co.*, 273 A.2d 606 (1971), the New Jersey Court had occasion to pass on the liability of a manufacturer for assembly made by his authorized dealer. The Court says in part:

"The tightening of the nut on the end of the axle bolt was done by Steele, president of the dealer, as noted above. If the jury should find upon a retrial of this action that the nut was improperly tightened by Steele, thereby causing side play and the locking of the wheel, would Yamaha, the manufacturer, be liable to the purchaser because of its having delegated this partial assembly function to the dealer?

"When a motorcycle, such as that involved herein, is received by Harley-Davidson from Yamaha, the handlebars are removed, the controls are disconnected from the handlebars, and the front wheel, front fender, seat and tail light are removed. The assembly is made by the dealer and the motorcycle is shown and sold to the purchaser in its assembled form.

"A manufacturer should not escape responsibility for breach of its warranty of fitness for purpose, when the breach is caused by an act of improper assembly—the assembly having been entrusted by the manufac-

turer to an authorized dealer, rather than to some employee of the manufacturer. It would be unrealistic to treat a motorcycle manufacturer as a mere purveyor of motorcycle non-assembled parts and relieve it from the warranty of merchantability simply because there is no showing of a defective component part.

"In Vandermark v. Ford Motor Company, 61 Cal.2d 256, 37 Cal.Rptr. 896, 391 P.2d 168 (Cal.Sup.Ct. 1964), it was held that an automobile manufacturer, which did not deliver its automobiles to the dealers ready to be driven away by the ultimate purchasers but relied on the dealers to make final inspections, corrections and adjustments necessary to make the automobiles ready for use, could not escape liability for a defect in the automobile on the ground that it may have been caused by something that an authorized dealer did or failed to do. As the court expressed it:

> '* * * as the manufacturer of the completed product, cannot delegate its duty to have its cars delivered to the ultimate consumer free from dangerous defects, it cannot escape liability on the ground that the defect in Vandermark's car may have been caused by something one of its authorized dealers did or failed to do. [37 Cal.Rptr. at 899, 391 P.2d at 171].'

"Vandermark also was concerned with whether a brake system had been properly installed and adjusted before the accident.

"(2) So, here, where Yamaha did not deliver its motorcycles to its dealer ready to be driven away by the ultimate purchasers but relied on the dealer to put into assembly the non-assembled parts and make the motorcycle ready for use, Yamaha could not escape liability for a defect in the motorcycle on the ground

that it may have been caused by something that its authorized dealer, Harley-Davidson of Essex, did or failed to do in attaching the front wheel to the fork of the subject motorcycle. Yamaha's manual, subsequently published, recognized the danger in this function when it noted a 3 mm. tolerance in the side play—a limit which could be exceeded, according to plaintiff's expert, by insufficient tightening of the particular nut at the end of the bolt.

"If the jury should find that the dealer's lack of a sufficient tightening of the particular nut was the cause of the front wheel's failure to rotate, then the jury might also visit responsibility upon defendant manufacturer for the function delegated by it to be performed by the dealer and not properly performed."

In a case decided by the Supreme Court of Oklahoma on June 15, 1971, *Ford Motor Co.* v. *Schweitzer, a Minor*, 42 O.B.J. 1577, not officially reported, a copy of which is attached as Appendix A, the manufacturer was held liable for damages arising from a defect in the car. The Court says:

"In the present case, a conclusion that the left tie-rod assembly in the steering mechanism of this car was defective when the car was sold and delivered to the plaintiff and was the proximate cause of the car's running off the roadway and of any resulting damages sustained by the plaintiff, would not be mere conjecture but would be within the sphere of legitimate and rational inferences from the established facts favorable to the plaintiff."

While this case is not officially reported, nor considered a precedent under Oklahoma Supreme Court rules, it is indicative of the Oklahoma law.

On page 5 of the Petition, the petitioner refers to certain cases which were decided by the Supreme Court of Oklahoma and which he says are contrary to the decision of the trial court. We respectfully disagree. The decisions referred to are as follows:

Coe v. *Esau,* 377 P.2d 815 (1963), holds the lessor of a filling station is not responsible for the lessee's negligence in installing a filter. It does not appear that the filter was manufactured by the lessor or sold by the lessor. Product liability is not involved.

Cities Service Oil Co. v. *Kindt,* 100 Okla. 64, 190 P.2d 1007 (1948), holds the lessor of a filling station not responsible for injuries to a pedestrian who slipped on oil negligently left on the sidewalk by the lessee. Product liability is not involved.

In *Michael* v. *Branham,* 327 P.2d 440 (1958), plaintiff, who was injured by the explosion of a bottle containing carbonated beverage, failed to show there had been no change of condition after the bottle left the manufacturer. In the case at bar, plaintiff showed the truck's steering had not been tampered with after its purchase from the manufacturer's dealer.

In *Carter Oil Co.* v. *Independent Torpedo Co.,* 107 Okla. 209, 232 Pac. 419 (1924), the Court held that *res ipsa loquitur* did not apply to the premature explosion of nitroglycerin in an oil well, the well not being in the exclusive control of the defendant, and that there was no evidence of negligence on the part of the defendant.

In *Ayers* v. *Amatucci,* 206 Okla. 366, 243 P.2d 716 (1952), the purchaser of a used car, which was destroyed

by fire, sued the dealer contending it was defective when sold to him. He failed to prove the defect existed at the time of sale. In the case at bar, of course, as previously pointed out, there was evidence that the defect existed at the time of the purchase of the truck from the manufacturer's dealer.

Gulf Oil Corporation v. *State*, 360 P.2d 933 (1961), holds a parent corporation not subject to fine for act of its subsidiary.

Sautbine v. *Keller*, 423 P.2d 447 (1967), holds a corporation not bound by quiet title suit against its president.

Wallace v. *Tulsa Yellow Cab Taxi and Baggage Co.*, 178 Okla. 15, 61 P.2d 645 (1936), holds a parent company liable for the tort of its subsidiary under the facts of that case.

None of the foregoing cases decided by the Oklahoma Court are in conflict with the decision in this case.

On page 6 of the Petition, counsel states there is a conflict between circuits, and refers to the decision of the Fifth Circuit in *Helene Curtis Industries, Inc.* v. *Pruitt*, 385 F.2d 841 (5th Cir. 1967), holding that the "plaintiff must prove that the product has not been substantially altered after leaving the maker's control." In the case at bar, plaintiff made such proof.

The remaining case referred to as being inconsistent with the decision of the Tenth Circuit is a very interesting case decided in 1958, *Ford Motor Company* v. *McDavid*, 259 F.2d 261 (4th Cir. 1958), from the Fourth Circuit, involving South Carolina law. The plaintiff was injured due

to a tire blowing out on a Ford automobile, which she contended was due to defective alignment of the tires when the car was purchased. The Court held that the plaintiff failed in her proof that the defect existed when the car was purchased, and makes this comment:

> "If it were shown that the wheels were misaligned by Ford, *it should not be relieved of its responsibility because a dealer under a duty to inspect and correct defects may have been negligent in the performance of its duty.*" (Emphasis added.)

This case is not contrary to the decision of the Tenth Circuit in the case at bar, but in fact is in accord with the decision.

The Circuit Court, in its opinion, points out:

> "We are, of course, entitled to lean on the judgment of the trial judge as knowledgeable and persuasive in the determination of the law and affairs of his resident state. (Citing authorities.) And since the judgment of the trial judge seems to reflect a desirable trend in the rapidly progressive field of product liability, we affirm."

The Circuit Court calls attention to the opinion of the Third Circuit Court in *Gizzi* v. *Texaco, Inc.*, now reported in 437 F.2d 308 (3rd Cir. 1971), *rehearing denied* March 8, 1971, where Texaco was held possibly liable for a defective used car sold on his behalf by a dealer. The apparent authority of the dealer was held appropriate for determination by a jury.

CONCLUSION

The Dodge truck was sold as new by an authorized dealer of the manufacturer, Chrysler Corporation. It had a defect when sold which caused injury to the plaintiff's ward. The sole contention of Chrysler Corporation to avoid liability is that the defect was caused by a wholly-owned subsidiary. The law in Oklahoma is that the manufacturer is liable under these circumstances. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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September, 1971

APPENDIX

FORD MTR. CO. v. SCHWEITZER, a Minor.
No. 43096. June 15, 1971.

(Not for Publication in Official Reporter)

Appeal from District Court, Kingfisher County; F. B. H. Spellman, Trial Judge.

Action for damages for breach of implied warranty of fitness against the manufacturer of automobile. From a jury verdict for the plaintiff and a judgment based thereon, defendant appeals. Primary contention: Evidence insufficient to sustain judgment in that no evidence of defect in the car's manufacture, which could be said to have been the proximate cause of the accident, was shown. Secondary contentions of error involves ruling on evidence. Judgment affirmed.

Wm. G. Smith, Fenton, Fenton, Smith, Reneau & Moon, Oklahoma City, for plaintiff in error.

Shutler, Shutler, Baker & Simpson, Kingfisher, for defendant in error.

LAVENDER, J. This appeal, by the defendant in the trial court, arises in an action in which the plaintiff, Tommy Joe Schweitzer, a minor acting through his father, sued Ford Motor Company for damages allegedly resulting from a one-vehicle accident.

The vehicle, a Ford Mustang automobile, manufactured by the defendant, had been sold and delivered to the plaintiff, as a new car, twelve days before the accident, by an authorized Ford dealer as to whom the plaintiff dismissed his action when the case was called for trial. It was being operated by the plaintiff, on a country road, when it left the roadway and collided with the embankment of a ditch, causing personal injuries to the plaintiff and considerable damage to the left-front portion of the vehicle.

[APPENDIX]

The plaintiff's case is based upon an implied warranty of fitness of the car for use for the purposes for which such cars are manufactured, and an alleged breach of that warranty. He alleges that, at the time of the sale and delivery of the car to him, a tie-rod assembly in the steering mechanism, consisting of two ball-and-socket pieces connected together by a threaded tubular connector, was "bent, broken, cracked and otherwise defective," causing the same to function improperly, and that the defective tie-rod was the proximate cause of the car's running off the roadway and of the resulting damages to him.

Various issues were raised by the defendant's amended answer. The defendant's demurrer to the plaintiff's evidence was overruled. The defendant presented its evidence, and, when the plaintiff rested without presenting any further evidence, moved for a directed verdict in its favor. That motion was overruled and the cause was submitted to the jury. Verdict, and judgment, were rendered for the plaintiff in the amount of $6,584.84. The defendant does not attack the amount of the verdict and judgment as being excessive.

The defendant filed a motion for judgment notwithstanding the verdict and, at the same time, filed a motion for a new trial. The trial court overruled both motions, and the defendant appealed to this court by case-made.

The defendant's basic contention on appeal is that the evidence concerning the facts, with the inferences which might reasonably be based thereon, does not justify a conclusion that the tie-rod assembly in question was defective when the car was sold and delivered to the plaintiff and was a proximate cause of the car's running off the roadway and colliding with the ditch embankment. We do not agree.

This contention involves the defendant's motion for a directed verdict in its favor, made at the close of all of the evidence. Under well-established principles of review in such a situation, this court does not weigh the evidence,

but considers all of the evidence favorable to the successful plaintiff and ignores all evidence unfavorable to him. See: North American Accident Insurance Company v. Ralls, Executor, (1955), Okl., 288 P.2d 1097, 1099; Fairmont Creamery Company et al. v. Rogers (1941), 189 Okl. 320, 116 P.2d 983, 984.

The pertinent portion of the plaintiff's own testimony may be summarized as hereinafter set forth. At and prior to the time of the accident, he was eighteen years of age, living with his parents about three miles south of Okarche, Oklahoma, and working in Kingfisher, about twelve miles from his parent's home. He had purchased the car involved herein, as a new car, twelve days before the accident, from a named, authorized Ford dealer at Watonga.

During that twelve-day period, all of his driving of the car had been on pavement, black-top or good dirt roads, mostly in going back and forth between his home and his place of work, and just riding around, and he had made one or two trips to Oklahoma City. He had never driven the car over fields or pastures, and had never hit a "high center" with it. On dirt roads, he ordinarily drove from 40 to 55 miles per hour, depending upon the condition of the road. The fastest he had driven the car was "probably" between 70 and 75 miles per hour, one time on the black-top road between Okarche and his home. He had never had any trouble with the steering prior to the time of this accident.

On the night during which this accident occurred, he left Kingfisher for home about 12:30 a.m. He drove west from Kingfisher, on Highway 33, seven miles and turned south on a "dirt" road which, he said, actually was hard clay with some sand in it. It had not rained for some time and there were no ruts in the roadway.

He had driven south on that road about three-quarters of a mile, at about 40 to 45 miles per hour, when he noticed

the car "easing" or "veering" (as distinguished from turning) to the right. The right wheels got down onto the slanted near side of the ditch on that side of the road but not all the way to the bottom of the ditch, with the left wheels still on the roadway or shoulder, a foot or so to the left of the ditch. The car traveled in that position for some distance, with him trying to steer it to the left, and giving it more gas, to get back on the roadway. He testified the car would not respond to his attempts to turn the wheel. He did not try to use his brakes. He said that he must have been knocked unconscious by the collision because the next thing he remembers is "coming to" about seven to seven-thirty a.m., with the car wrecked in the ditch on the left-hand side of the road.

A garage owner who was called to tow the car to his place of business in Kingfisher arrived at the scene around eight or eight-thirty a.m. The car was in the east ditch, headed south but at a slight angle toward the east, with only the right-rear wheel on the roadway. When he pulled the car backwards from the ditch and was looking for a place to hook onto the front end to raise it for towing, he saw a tie-rod assembly in the ditch, about where the back end of the car had been before he moved it. He picked up the tie-rod and, before putting it in the plaintiff's car, noticed that it was rusty colored except for one shiny spot on a corner of the end that would be nearest to the wheel when installed, and that it was badly bent and the stud bolts at each end of the assembly had been broken off.

This witness identified an exhibit as appearing to be the tie-rod assembly that he had picked up from the ditch, but said it had been all shined up since then. He stated that a separate tie-rod assembly connects the steering spindle on each front wheel to the steering arm or bar which, in turn, is connected to the steering column and wheel, so that both front wheels turn the same way at the same time when the steering wheel is turned; that the one from the

plaintiff's car was the left tie-rod assembly; and that, if the left tie-rod is disconnected from the left-front wheel or from the steering arm or bar, the right-front wheel will still be turned either way by movement of the steering wheel. This witness further testified that no other parts of the car were found under it other than the tie-rod.

A representative of Ford Motor Company, who testified for the defendant, identified an exhibit as a new left tie-rod assembly for a Mustang of the model of the plaintiff's car. Using the two tie-rod assemblies, he pointed out where the plaintiff's tie-rod had been bent and twisted out of shape and how much of the stud bolts at each end had been broken off. He also testified that the plaintiff's car had been shipped from an assembly plant to a Ford dealer in Oklahoma City, and would have been driven from there to the Ford dealer's place in Watonga where the plaintiff purchased the car.

The highway patrol trooper who worked the accident testified as a witness for the defendant. He arrived at the scene about 7:45 a.m., and found the plaintiff's car in the east ditch, headed south but at a slight angle to the east. No one was in the car. He measured the tire tracks left by the car. The car had traveled, in a straight line, with the right wheels part way down on the sloped near side of the west ditch and the left wheels on the roadway about as far to the left of the edge of the ditch as the right wheels were to the right of it, for a distance of 240 feet, and then "broad slid" for a distance of 135 feet, across the road at an angle and into the east ditch. The car's movement to the right from the roadway onto the sloping side of the west ditch had been gradual, with nothing to indicate that the wheels had been turned to the right.

The wrecker driver had also observed the tire tracks left by the plaintiff's car. His description of them was substantially the same as the trooper's, except that he had not made any measurements, and he had noticed a "little

streak" some 12 to 14 inches to the right of the left tire tracks where the car had been on the west side of the road with its right wheels on the sloping side of the ditch. Where the car crossed the road at an angle, he didn't see the "little streak," but the track of the left-front wheel was broader than the track of the right-front wheel. He also stated that the track of the left-front wheel went part way up, and along, the far embankment of the east ditch, and that only the right-rear wheel was on the roadway when he arrived at the scene.

In Pennsylvania Glass Sand Corporation of Oklahoma v. Ozment (1967), Okl., 434 P.2d 893, this court held, in the third and fourth paragraphs of its syllabus:

> "The essential elements necessary to establish a cause of action may be inferred from all the facts and circumstances, and where the circumstances are such as to remove the case from the realm of conjecture and place it within the sphere of legitimate and rational inferences from established facts, a prima facie case is made.
>
> "In civil cases the facts are provable by direct or circumstantial evidence, or by both, and it is not required that the proof rise to such degree of certainty as will support but one conclusion to the exclusion of all others."

In the present case, a conclusion that the left tie-rod assembly in the steering mechanism of this car was defective when the car was sold and delivered to the plaintiff and was the proximate cause of the car's running off the roadway and of any resulting damages sustained by the plaintiff, would not be mere conjecture but would be within the sphere of legitimate and rational inferences from the established facts favorable to the plaintiff.

The trial court did not err in overruling the defendant's motion for a directed verdict in its favor.

The defendant contends that the trial court erred in denying its motions for summary judgment under Rule 13 of this court's rules for the guidance of the district, superior, and common pleas courts of this state (Chapter 2 of Title 2, O. S. Supps. 1965-1970). The object of that rule is to avoid a useless trial. Flick, Administratrix v. Crouch et al. (1967), Okl., 434 P.2d 256, 262; Perry v. Green (1970), Okl., 468 P.2d 483, 489. When, as in this case, the trial court denies a defendant's motion for summary judgment and a trial of the issues made by the pleadings is had, at which evidence is adduced supportive of the plaintiff's position, the reason for the rule ceases to exist insofar as that case is concerned. The question becomes academic.

The defendant presents two other propositions. One is that the trial court erred in refusing to admit into evidence certain portions of a deposition offered by the defendant. The other is that the trial court abused its discretion in refusing to permit the defendant's witnesses to use a replica of the suspension system and steering linkage of the plaintiff's car so that any jurors who had no personal knowledge of such things could understand how a tie-rod assembly fits into the suspension and steering systems of such a car and how the one involved herein could have been bent out of shape and broken off by the sudden impact and pressure on it when the left-front wheel of the plaintiff's car collided with the ditch embankment.

There was clear testimony, by the wrecker-driver who testified for the plaintiff, as well as by an expert in the field of fatigue and stresses in metals who testified for the defendant, as to where the two tie-rods fit into the steering mechanism of a car. One witness for the defendant used a new, left tie-rod for this model Mustang to show where, and how much, the plaintiff's tie-rod had been bent out of shape and how much of the stud bolts at each end had been broken off. We do not think that the replica in question was indispensible to the jurors' understanding that it was

possible for the sudden stresses of the impact of the left-front wheel of the plaintiff's car against the ditch embankment to have been transmitted through the steering mechanism to the left tie-rod, or to the jurors' determination of the proximate cause of the accident (which was their principal problem). In the circumstances, the trial court did not abuse its discretion in refusing the use of the replica in question.

There is nothing in the case-made to indicate that the depostion involved in the defendant's offer of proof was ever filed in the case. The offer, as made, indicates that the material portions of the proffered testimony would disclose the results of tests made by the witness on the tie-rod involved herein, and the witness' opinion as to the cause of the condition of the tie-rod after the accident. That testimony would have been in harmony with, and cumulative to, the testimony of a qualified expert who testified for the defendant. The offer did not include any mention of the qualifications of the deposing witness as an expert in any field. Any error in rejecting the proffered portions of the deposition in question was not prejudicial to the defendant, so is not ground for reversal of the judgment (12 O.S. 1961 §78; 22 O.S. 1961 §1068).

Affirmed.

All Justices concur.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-172

CHRYSLER CORPORATION,
Petitioner,

VERSUS

OPAL I. VAUGHN, Guardian of the Person and Estate of Johnnie B. Vaughn and MID-CONTINENT CASUALTY COMPANY,
Respondents.

REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September, 1971

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

TABLE OF CONTENTS

	PAGE
Statement and Argument	1
Summary	13

TABLE OF AUTHORITIES

CASES:

Ayers v. Amatucci, 206 Okla. 366, 243 P.2d 716	5
Barnhart v. Freeman Equip. Co., 441 P.2d 993 (Okla. 1968)	3, 4
Buckner, et al. v. Dillard, et al., 184 Okla. 586, 89 P.2d 326 (1939)	9
Ford Motor Co., v. Schweitzer, a minor, 42 O.B.J. 1577	13
Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 27 Cal.Rptr. 697, 337 P.2d 897	4
Gulf Oil Corporation v. State, 360 P.2d 933 (Okla. 1961)	8
Heaton v. Ford Motor Company (Ore. 1967), 435 P.2d 806	3
Helen Curtis Industries, Inc. v. Pruitt (5th Cir.), 385 F.2d 841 (1967)	3
Kerr v. Corning Glassworks (Minn. 1969), 169 N.W.2d 587	3, 4
Marathon Battery Co. v. Kilpatrick, 418 P.2d 900 (Okla. 1965)	3, 4
McSparran v. Bethlehem Minerals Company, 210 F.Supp. 21 (E.D. Pa. 1962)	9
Michel v. Branham (Okla.), 327 P.2d 440	3
Miller v. Bethlehem Steel Corporation, 189 F.Supp. 916 (S.D. W. Va. 1960)	9

AUTHORITIES CONTINUED — PAGE

O. S. Stapley Company v. Miller (Ariz. 1967), 430 P.2d 701 ..... 3, 4

Shramek v. General Motors Corp. (Ill.App. 1966), 216 N.E.2d 244 ..... 3, 4

State Stove Manufacturing Company v. Hodges (Miss.), 189 So.2d 113 6

State v. Freeman, et al., Okla., 447 P.2d 782 (1968) 9

Texas Metal Fabricating Company v. Northern Gas Products Corporation, 404 F.2d 921 6

Zoerner v. Eisner Grocery Co. (1969), 111 Ill.App. 2d 342, 250 N.E.2d 156 ..... 3-4, 5

Zubick v. Zubick, 284 F.2d 267 (1967) 9

MISCELLANEOUS:

19 Am.Jur.2d, Corporations, Sec. 717, pp. 217, 218 8

Annotation 7 A.L.R.3d, p. 1355 9

Restatement of Torts, Second, Sec. 402A 4

In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-172

CHRYSLER CORPORATION,
Petitioner,

VERSUS

OPAL I. VAUGHN, Guardian of the Person and Estate of Johnnie B. Vaughn and MID-CONTINENT CASUALTY COMPANY,
Respondents.

REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT AND ARGUMENT

The respondents' statement of the case and argument contains two fundamental errors, each of which relate directly to the reason that Petition for Writ of Certiorari should be granted.

I

First, the statement of respondents that the subject accident occurred to a defect in the steering mechanism which existed at the time the truck was purchased by the respondent's employer is incorrect. There was no such

proof. The subject truck had been driven 18,993 miles since it left the hands of Chrysler totally free of any steering problems until it hit an embankment at the time of the subject accident. The respondents produced no evidence by expert testimony or otherwise, that the claimed defect (a clamp on the steering assembly was found loose *after* the accident) was, or could have been, present at the time the vehicle was purchased or could have been operated for 18,993 miles with a loose clamp without the condition becoming apparent long before the accident.

As it relates to this question, the evidence did show, without contradiction or dispute, that the *nut, bolt* and *lock-washer* on this steering gear clamp found after the accident *was not* from Chrysler Corporation and *was not* from Dodge Trucks, Inc., the independent dealer which had changed the steering gear and clamp (for its own purposes —not Chrysler's) *after* the subject truck had left the control of Chrysler Corporation (App. 54, 55, 58, 59). The evidence further showed that it was mechanically impossible for the truck to have been driven 18,993 miles with a steering clamp improperly tightened and that after the accident, the steering gear showed the failure had occurred as a result of the truck's front wheel having "hit some object very, very hard" (App. 25; Tr. 371, 372, 461-463).

It is interesting to note that the respondents have not, in any of their briefs, referred to one iota of evidence or inference to support their claim that the alleged defect existed at the time of the truck's purchase 18,000 miles before the accident. They cite no such evidence because none existed.

Neither the trial court nor the Court of Appeals had to surmise or speculate as to the law of Oklahoma in this products liability case.

The Supreme Court of Oklahoma has basically adopted the so-called doctrine of Strict Liability in Tort (breach of implied warranty of fitness of a product) where injuries are alleged to have resulted from the use of a product. *Marathon Battery Co.* v. *Kilpatrick*, 418 P.2d 900 (Okla. 1965); *Barnhart* v. *Freeman Equip. Co.*, 441 P.2d 993 (Okla. 1968).

Whether the action is based upon Breach of Implied Warranty of Fitness or on Strict Liability in Tort, it is clear that a user may not recover for damages allegedly sustained from the use of a product unless he establishes by a preponderance of the evidence the following basic requirements:

1. That a defect existed at the time the product left the particular defendant's (dealer or manufacturer) control;
2. That the defect rendered the product unreasonably dangerous to the user; and
3. That the injury or damage resulted from this condition or defect in the product.

Michel v. *Branham* (Okla.), 327 P.2d 440; *Helen Curtis Industries, Inc.* v. *Pruitt* (5th Cir.), 385 F.2d 841 (1967) (applying Oklahoma law); *Kerr* v. *Corning Glassworks* (Minn. 1969), 169 N.W.2d 587; *Heaton* v. *Ford Motor Company* (Ore. 1967), 435 P.2d 806; *O. S. Stapley Company* v. *Miller* (Ariz. 1967), 430 P.2d 701; *Shramek* v. *General Motors Corp.* (Ill.App. 1966), 216 N.E.2d 244; *Zoerner* v. *Eisner*

Grocery Co. (1969), 111 Ill.App.2d 342, 250 N.E.2d 156; *Restatement of Torts,* Second, Sec. 402A, and many, many others. (We find no cases to the contrary.)

As it was stipulated Dodge Trucks, Inc. had changed the steering assembly (for its own purposes) *after* the truck left the hands of Chrysler (App. 59), there was a complete failure of proof of the first basic requirement for making a claim against Chrysler.

As was stated in *Shramek* v. *General Motors Corp., supra,* at page 247:

> ". . . Whether the charge is breach of implied warranty negligence or the strict tort liability now recognized in both Illinois (*Suvada* v. *White Motor Company*) . . . and California (Greenman v. Yuba Power Products Inc.) . . . (1962), the cornerstone of plaintiff's cause of action is the *existence of a defect in the tire at the time it left the control of the manufacturer or seller.* Without this proof, this case must fall." (Emphasis ours.)

In *Marathon Battery Company* v. *Kilpatrick, supra,* and *Barnhart* v. *Freeman Equipment Co., supra,* the Oklahoma Supreme Court also cited with approval *Greenman* v. *Yuba Power Products, Inc.,* 59 Cal.2d 57, 27 Cal.Rptr. 697, 337 P.2d 897.

As stated in *Kerr, et al.* v. *Corning Glassworks, supra:*

> "Although the rule of strict liability as pointed out in McCormack v. Hankscraft Co., Inc. supra does not require plaintiff to prove negligence or that the injured party was in privity with the manufacturer, *it is necessary under this rule to prove a defect in the product before it left defendant's factory.* Here, we have no such proof." (Emphasis added.)

In *Zoerner* v. *Eisner Grocery Co., supra* (1969), the Illinois Supreme Court said:

> ". . . (Strict Liability) is *not*, contrary to what it is sometimes called, a doctrine of absolute liability entitling any person harmed in using a product to recover from any member of the production and distribution group. It does *not* make a manufacturer, distributor or retailer an insurer of the consumer's safety. It *is* liability without negligence, but it is *not* liability without fault. There must be a defect in the product, it must be established as existing at the time of leaving defendant's control, and it must be such as renders the product unreasonably dangerous to the consumer." (Citing the *Suvada* case—emphasis by the Court.)

It can thus be readily seen from the above, whether a case is based upon Strict Liability in Tort or upon a Breach of Implied Warranty of Fitness, all courts, including Oklahoma, hold that *it does not* create absolute liability, *it is not liability without fault,* and that there must be proof of a defect which existed at the time it left the defendant's control. *Ayers* v. *Amatucci,* 206 Okla. 366, 243 P.2d 716, and the other Oklahoma cases, heretofore cited.

At the trial the parties stipulated and the court found, as relates to the alleged steering condition, that the truck which Vaughn was driving at the time of the accident was not a truck assembled by Chrysler but was a truck assembled and placed on the market by Dodge Trucks, Inc., and that such material change made by Dodge Trucks, Inc., was without the knowledge, request or direction of Chrysler Corporation (App. 55, 59, 70).

Under the existing law in Oklahoma and elsewhere, such material change clearly insulates the original manu-

facturer. The plaintiff below, Vaughn, chose only to sue Chrysler Corporation in this action. Chrysler *is not*, admittedly, the wrongdoer and, admittedly, *did not* create the condition which is claimed to have caused the accident after 18,993 miles of trouble-free operation.

A good illustration of the insulating effect of such material change in a product after leaving the hands of a manufacturer under existing law is the case of *Texas Metal Fabricating Company* v. *Northern Gas Products Corporation*, 404 F.2d 921 (from the same 10th Cir. Court of Appeals, 1968). This case involved an action against both a manufacturer and the installer of a heat exchanger for injuries received by an employee from a gas explosion. The evidence showed that the heat exchanger had been modified after leaving the hands and control of the manufacturer by the defendant installer. *In reversing a judgment against the manufacturer*, the Court of Appeals said, at page 925:

> "As indicated above, the record shows with little or no question that the alteration by Fluor caused this puncture in the tube and thus this accident. This resulted either from the manner in which it was done or it was the wrong solution for the rattle. This intervening act by Fluor and the owner was clearly shown to be the cause of this accident and Texas Metal cannot be held liable."

To the same effect is *State Stove Manufacturing Company* v. *Hodges* (Miss.), 189 So.2d 113, wherein a judgment against a water heater manufacturer was reversed and judgment rendered for the manufacturer as the evidence showed the heater did not reach the user in the same condition as when it left the hands of the manufacturer. The

contractor and the installer had made a material change to the heater which constituted an intervening, sole proximate cause of the damage suffered by the complainant.

To allow the present opinion of the Court of Appeals to stand, does create new law, contrary to the law of the State of Oklahoma and elsewhere, and does (as admitted by the Court of Appeals) go "much further than . . . existing law" in that it *does* create absolute liability on a manufacturer, it *does* create liability without fault and *does* create liability where material changes have been made to the product, unknown, and unsanctioned by the manufacturer, after leaving the hands and control of the manufacturer (the only defendant herein). It, thus, violates the *Erie Railroad* doctrine and creates a conflict between opinions of the various Circuit Courts as to the necessity of applying existing State law.

II

The second fundamental error is the claim that Dodge Trucks, Inc., was not an independent truck dealer. The trial court clearly found adversely to the respondents' claim in this respect. (Respondents failed to take issue or appeal as to this adverse ruling.) The argument that Chrysler is responsible for an alleged tort of Dodge Trucks, Inc., the independent dealer, is contrary to the evidence, findings of the trial court, and the law of Oklahoma and elsewhere.

The trial court found that Dodge Trucks, Inc., was a "very legal, proper and legitimate separate entity from Chrysler Corporation. . . . There is no sham; there is no attempt to put a fraud on the public; the subsidiary Dodge Trucks, Inc., was well financed, well capitalized, as shown

by the affidavits on file in this case. . . . I find by the great weight of authority and under the facts in this case, the parent corporation, Chrysler, is not liable for the acts of its wholly owned subsidiaries" (App. 69).

The fundamental error which occurred (necessitating the appeal and this Petition for Writ) was that the trial court correctly *found* under the evidence and Oklahoma law "the parent corporation (once removed), Chrysler, is not liable for the acts of its wholly owned subsidiaries," *then instructed the jury* exactly opposite to such finding (App. 72).

The general rule regarding the liability of a parent corporation for the acts of a subsidiary is stated in 19 Am. Jur.2d, *Corporations*, Sec. 717, pp. 217, 218, as follows:

> "The fact that a corporation owns the controlling stock of another does not destroy the identity of the latter as a distinct legal entity; and, ordinarily, no liability may be imposed upon the latter for the torts of the subsidiary corporation. The fact that corporations have common officers, occupied common offices, and to certain extent, transact business for each other do not make one corporation liable for the acts of another, except upon established legal principles."

Oklahoma specifically follows the above general rule.

In the case of *Gulf Oil Corporation* v. *State*, 360 P.2d 933 (Okla. 1961), it was held that Gulf Oil Corporation was not responsible for its wholly-owned subsidiary, Gulf Refining Company, which owned and operated pipelines through which Gulf Oil Corporation's crude oil purchases were transported as there was no evidence of a design or scheme to perpetrate a fraud or that the subsidiary was a

mere dummy or sham. This case is cited with approval in *State* v. *Freeman, et al.*, Okla., 447 P.2d 782 (1968).

In *Buckner, et al.* v. *Dillard, et al.*, 184 Okla. 586, 89 P.2d 326 (1939), the Supreme Court of Oklahoma stated in its second syllabus on page 326:

> "One of the recognized purposes of incorporation is to permit persons to avoid personal liability either entirely or beyond a statutory amount, and the mere fact that a corporation is organized for the expressed purpose of avoiding personal liability in the operation of a coal mine is not sufficient reason for piercing the corporate veil in order to impose secondary liability under the Workmen's Compensation Law on a stockholder, in the absence of any evidence of fraud or device to evade the Workmen's Compensation Law."

A very similar and succinct application of the general rule (the same as Oklahoma) is found in *Miller* v. *Bethlehem Steel Corporation*, 189 F.Supp. 916, 917 (S.D. W. Va. 1960), wherein the Court held that Bethlehem Steel Corporation could not be held responsible for alleged negligent acts of its wholly-owned subsidiary, Bethlehem Steel Company. This case was cited with approval in *Zubick* v. *Zubick*, 284 F.2d 267 (1967). To the same effect is *McSparran* v. *Bethlehem Minerals Company*, 210 F.Supp. 21 (E.D. Pa. 1962).

At pages 6, 7 and 8 of respondents' brief in opposition, the respondents list eleven factors which they deem relevant to the question of the liability of a parent company for the torts of a subsidiary, as suggested in 7 A.L.R.3d, page 1355 (annotation begins at page 1343).

The evidence on this issue is found in the Appendix of the Record, pages 31-46 (introduced by respondents [plaintiffs below]), and in Chrysler's Motion for Summary Judgment. As the respondents' comment in their brief as to the evidence on these listed factors are so patently incorrect, we review these factors and the actual evidence:

(1) "Presence in both corporations of the same officers or directors:"

Negative. No officers or directors of Dodge Trucks, Inc., were officers or directors of Chrysler Corporation (App. 43; Tr. 309, 310).

(2) "Common shareholders:"

As in every wholly-owned subsidiary, Chrysler Corporation does own all the issued stock of Chrysler Motors Corporation and Chrysler Motor Corporation owns all stock of Dodge Trucks, Inc.

(3) "Financial support of the subsidiary's operations by the parent:"

Aside from the initial capital stock investment in 1964 by Chrysler Motors Corporation, Dodge Trucks, Inc., obtains its capital to operate its activities from sales of new Dodge trucks, and from sales of used trucks, parts, and services for all makes and types of trucks (App. 44; Tr. 311, 312).

(4) "Underwriting the incorporation and purchase of all the capital stock of the subsidiary by the parent corporation:"

Initial corporation was by Chrysler Motors Corporation in 1964.

(5) "The fact that the subsidiary was organized with a grossly inadequate capital structure:"

Negative. As found by the trial court and as shown by the affidavits attached to Chrysler's motion for summary judgment, Dodge Trucks, Inc., clearly had an adequate capital structure (over $9,000,000.00 in assets in 1966) (App. 69; Tr. 492, 493; Motion for Summary Judgment).

(6) "A joint accounting and payroll system:"

Negative. Dodge Trucks, Inc., maintained its own separate bank accounts, had its own separate funds, had its own separate checks for payroll and expenses, and paid its own bills from its own money. Chrysler merely provided computer service for computing the various payroll checks issued from Dodge Trucks, Inc. (App. 45, 46; Tr. 315, 317, 318).

(7) "Subsidiary lacks substantial business contacts with any save the parent and operates solely with assets conveyed by the parent corporation:"

Negative. Dodge Trucks, Inc., operates as a separate independent corporation. Its officers and directors are separate from Chrysler. It does its own advertising, sells new and used trucks of various makes and sizes, competes with other authorized, private, franchised dealers, purchases supplies from other companies even though the same part may be sold or manufactured by Chrysler Corporation (App. 38-40, 42-44, 53; Tr. 295, 300, 304, 308, 311, 312, 415).

(8) "In the financial statements of the parent, the subsidiary is referred to as a division of the parent corporation or obligations are assumed to be those of the parent:"

Negative. Dodge Trucks, Inc., operates as a separate and distinct corporation as any other independent pri-

vate corporation and is not referred to as a division of Chrysler or Chrysler Motors (App. 37-45) (and the trial court so found) (App. 69).

(9) "The property of the subsidiary is used by the parent corporation as its own:"

Negative. As shown by the testimony referred to above, it is a separate distinct corporation with separate bank accounts and separate property (App. 38-45) (and the trial court so found) (App. 69).

(10) "The individuals who exercise operating control over the subsidiary exercise it in the interest of the parent:"

Negative. As referred to above, Dodge Trucks, Inc., operates as a separate independent corporation as a retail dealer under the direction and control of its own officers and directors (App. 38-44).

(11) "Failure to observe the formal requirements attributable to the operation of a subsidiary:"

Negative. Dodge Trucks, Inc., has regular separate meetings of its Board of Directors, keeps regular minutes of corporate meetings, has seven members of its Board of Directors (minimum authorized three) (App. 43-44); *and the trial court so found.*

The burden of proof to show that Dodge Trucks, Inc., was not a separate, distinct, independent corporation but was merely a tool, division or adjunct of Chrysler Corporation; or was merely a dummy, sham or fraud on the public, was on the respondents (plaintiffs below). The respondents failed to produce any such evidence, and the trial court found Dodge Trucks, Inc., to be a perfectly legal, proper and legitimate separate entity from Chrysler Corpo-

ration. The respondents, having failed to sustain their burden of proof and failing to object to the findings of the trial court in this regard, should not now be heard on this question.

In their responsive brief, respondents cited the case of *Ford Motor Co.* v. *Schweitzer, a minor,* 42 O.B.J. 1577, and attached as the appendix the opinion entered June 15, 1971. This opinion is not analogous to the case at bar as it does not relate to material changes made after leaving the manufacturer by a dealer, a subsidiary, or anyone. Not only does the opinion itself show that it is "Not for Publication in the Official Reporter" but, also, the opinion *is not final* and is presently pending before the Oklahoma Supreme Court on Petition for Rehearing and the appellees have been ordered to respond to such Petition for Rehearing filed by Ford Motor Company.

SUMMARY

It is respectfully submitted that under the law and facts in the case at bar, Writ of Certiorari should be granted in this case for the reason that the decision of the Court of Appeals admittedly creates new law; it conflicts with decisions hereinabove referred to of the Oklahoma Court applying the law of Oklahoma which are controlling in this case and which are set forth in the Petition for Writ of Certiorari.

Upon granting Writ of Certiorari and in review of the evidence and law, it is respectfully submitted that judgment n.o.v. should be granted the petitioner Chrysler Corporation in this cause for the following reasons:

1. The evidence is wholly insufficient to show a defect existed in the subject truck when it left the hands and control of Chrysler Corporation (the only defendant herein) and is further insufficient to show an alleged defect existed at the time it left the hands and control of Dodge Trucks, Inc., or Clark Motor Company, subsequent sellers of the truck.

2. That in any event the parent corporation is not responsible for the alleged negligent acts of wholly-owned subsidiary (absent fraud, sham and other factors not involved herein) under the law of Oklahoma and elsewhere and that under the facts, the cause of action of the respondents, if any, must be asserted against Dodge Trucks, Inc., or Clark Motor Company—not against Chrysler Corporation.

Respectfully submitted,

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